

46 Am. Jur. 2d Judges § 184

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Judges

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IX. Disqualification to Act in Particular Case

C. Remedies and Procedure

3. Motion for Disqualification and Affidavit

b. Affidavit of Prejudice

§ 184. When mere filing of affidavit of prejudice to disqualify judge disqualifies

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Judges](#)  51(3)

Forms

Forms relating to affidavits for disqualifying judges, generally, see Am. Jur. Pleading and Practice Forms, Judges; Am. Jur. Pleading and Practice Forms, Motions, Rules, and Orders; Am. Jur. Pleading and Practice Forms, Criminal Procedure [\[Westlaw®\(r\) Search Query\]](#)

Under some statutes, the timely filing of a proper affidavit charging bias or prejudice on the part of the judge is sufficient to disqualify the judge without any hearing or determination as to whether the affidavit is true or false¹ and without regard as to whether the judge is actually biased or prejudiced.² Because it is the affidavit itself, rather than its truth, which disqualifies the judge,³ such statutes are not an invasion of judicial power and have been found to be constitutional.⁴

In other jurisdictions, the judge may not pass on the truth of the factual allegations set forth in the affidavit, but can only decide their legal sufficiency.⁵

Footnotes

- 1 Hendrickson v. Superior Court In and For Cochise County, 85 Ariz. 10, 330 P.2d 507, 73 A.L.R.2d 1235 (1958); State v. Tapio, 432 N.W.2d 268 (S.D. 1988).
As to informal peremptory challenges to a judge, see § 179.
- 2 State v. Tapio, 432 N.W.2d 268 (S.D. 1988).
- 3 Price v. Featherstone, 64 Idaho 312, 130 P.2d 853, 143 A.L.R. 407 (1942).
Filing a timely and compliant affidavit for a change of a judge results in mandatory, automatic disqualification. O'Neill v. O'Neill, 2016 SD 15, 876 N.W.2d 486 (S.D. 2016).
- 4 U'Ren v. Bagley, 118 Or. 77, 245 P. 1074, 46 A.L.R. 1173 (1926).
As to the validity of statutes governing disqualification, generally, see § 82.
As to actions of court upon filing affidavit of prejudice, see § 191.
- 5 § 190.

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